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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HUSSMANN CORPORATION,
Petitioner,

VS.

ROSETTA COOK,
Respondent

Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITIONER'S REPLY BRIEF

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Respondent's Brief in Opposition ("Opp.") emphasizes that the decision below is based on a simple analysis of the "elements" of a claim for workers' compensation retaliatory discharge under R.S.Mo. §287.780 and a straightforward determination that the Missouri-law claim is "the same" as the Illinois claim this Court held not to be preempted in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). *See* Opp. at 7, 8, 9 & 11 n. 10. In stressing this aspect of the Missouri Supreme Court's analysis, and the particular test of §301 preemption necessarily entailed therein, Respondent's Brief confirms and concedes that the issues framed in the Petition are indeed well-presented by this case.

Respondent's own characterization of the opinion below correctly zeroes in on the troubling aspect of this case. The

opinion applies a test of preemption which looks only to the underlying state *law* and concludes that the *law* is by nature "independent" of the CBA and therefore not subject to preemption. The opinion reasons that "the analysis in *Lingle* applies with equal force to Missouri's workers' compensation *statute*" (Petition Appendix A-5, emphasis added), that "*like the Illinois statute* at issue in *Lingle*, *§287.780* created a judicially cognizable *independent* tort" (A-5, emphasis added), and, therefore, this case falls within the "exception to the reach of federal preemption" "the United States Supreme Court recognized [in *Lingle* for] workers' compensation cases" (A-4). Strictly based on a comparison of the two states' *laws*, the Missouri high court thus concluded that respondent's claim was "independent" of the CBA and therefore not preempted. The court so ruled even though its opinion also specifically acknowledges that petitioner Hussmann's defense in this case is that "[respondent] was terminated for insubordination for failing to disclose pre-employment injuries and back problems in her employment application, *in violation of plant rules*[1] *and the labor agreement*" (A-2, emphasis added; *see also* A-9).[2]

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[1]Hussmann's "Plant Rules" are also incorporated into the CBA. *See* CBA Article 4 ¶J (L.F. 41); *see also* Article 8 §1 (L.F. 45).

[2] Hussmann's CBA defenses were established in the record by means of the Halpern affidavit supporting summary judgment. The affidavit, competently based on business records, states in pertinent part:

> [Respondent] was terminated by Hussmann on September 4, 1990 for violations of Plant Rule 1 (falsification of application or other company records), Plant Rule 20 (insubordination) and Article 9 §4 ¶I of the aforesaid collective bargaining agreement (falsification or omission of relevant information on employment application), in that a worker's compensation claim recently filed by [respondent] against the Second Injury Fund claimed pre-employment injuries and back problems which [respondent] had denied having on written employment applica-

(Footnote 2 continued next page)

Manifestly, as Respondent's Brief impliedly concedes, the first two Questions Presented set out in the Petition are properly raised by the opinion below. These questions pose fundamental unresolved issues concerning the proper test courts should apply in determining §301 preemption. Specifically, using Respondent's terminology, should the test for preemption focus exclusively on the "elements" of the state-law tort claim and inquire whether those elements, considered in the abstract, are of such a nature as to render the claim "independent" of the CBA for §301 purposes — the test employed in the opinion below? Or should the test require an analysis not just of the legal "elements," but also of the particular facts and allegations in the case, including those raised by the defendant's defenses, and inquire whether the fact-finder will need to interpret or analyze any CBA provisions in resolving the merits of the claim, as petitioner contends and other courts have held (*see* authorities cited in the Petition at 20 n. 22)? These are the key competing tests that have confused and split the courts. This case, respondent's own analysis confirms, presents them well.

(Footnote 2 continued)

> tion forms submitted by her to Hussmann in 1987, and, when directed by Hussmann supervisory personnel to answer questions concerning the apparent false statements in her employment application forms, she refused to answer any questions.

L.F. at 35-6. The entire CBA is also in evidence in the record below (*see* L.F. at 35 & 37-69). Respondent's contention that Hussmann's CBA defenses were not properly in the record before the Missouri Supreme Court because Hussmann had not yet filed its answer (Opp. at 7 & 11 n. 11) is therefore without merit. Hussmann's CBA defenses were in the record by virtue of the summary judgment affidavit and are also specifically alluded to in both appellate court opinions below (*see* A-2 & A-9). A motion for summary judgment is a typical procedural device by which §301 preemption objections may properly be asserted and preserved for review. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 206 (1985) (sustaining §301 preemption objection raised by motion for summary judgment and supporting affidavits filed in state court).

Under the test espoused by respondent and the court below, workers' compensation claims are virtually immunized from §301 preemption. Under their test, preemption could occur only if an element of the tort claim as defined by state law contained a specific reference to collective bargaining agreements — an unlikely prospect. Given the unlikelihood that a state-law "element" would itself require construction of provisions in the labor agreement, such claims, under this view, would effectively comprise an "exception to the reach of federal preemption," as the opinion below acknowledges (A-4).

Respondent is unable to explain why workers' compensation retaliation cases should be immunized from federal preemption in this fashion. She suggests, quoting the Missouri Supreme Court's opinion, that the right to assert such claims "cannot be bargained away." Opp. at 12; Petition A-6. But this Court in *Lingle* specifically stated that the fact that a right to be free from retaliatory discharge may be "non-negotiable" under state law is irrelevant to preemption analysis:

> [A] State could create a remedy that, although non-negotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be preempted by §301.

Lingle, 486 U.S. at 407 n. 7. The assertion that retaliation claims are "non-negotiable" and cannot be "bargained away," even if true, therefore cannot be used to justify the urged *absolute* "exception to federal preemption." The foregoing excerpt clearly indicates that such claims may well, in their "*application*," require CBA "interpretation" and therefore "be preempted."[3]

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[3]Respondent also cites the "cannot-be-bargained-away" language from the opinion below in support of the opinion's further express holding that

(Footnote 3 continued next page)

Respondent further asserts, as does the opinion below, that it is the "motive" element of retaliation claims which, due to its "purely factual" character, immunizes such claims from §301 preemption. *See* Opp. at 11; Petition A-4 to A-5. In response to the numerous cases which hold to the contrary — sustaining §301 preemption where the employer invokes CBA provisions defensively to explain its actions and "motives" (Petition at 20 n. 22) — respondent dismisses these cases as not involving workers' compensation retaliation claims. Opp. at 10-11. But this begs the question. Again, why is it that workers' compensation retaliation claims are insulated from federal preemption when other types of state-law claims would be preempted under analytically identical circumstances? Respondent, the court below and other post-*Lingle* cases in accord therewith offer no answer to this question, other than to parrot conclusory phrases from *Lingle* which are inapposite by virtue of the final and binding arbitrator's award in that case.[4] *See* Petition at 12-13, 15 n. 15 & 17-18 n. 18.

(Footnote 3 continued)
there was no "waiver" in this case. *See* Opp. at 12; Petition A-6. With respect to the "waiver" issue (the Petition's third Question Presented), the "clear and unmistakable" evidence of waiver in this case consists of the specific CBA provisions which authorized Hussmann's conduct and which directly conflict with respondent's asserted state-law rights. *See* Petition at 21-22. To the extent respondent and the decision below would require extrinsic or parol "evidence" of waiver beyond the four corners of the CBA, this urged dubious requirement only further fortifies petitioner's contention that there is a need for this Court to speak to and clarify the concept of "waiver" in this important labor context.

[4]Respondent's statement that this Court "reversed" a finding of preemption in a companion case to *Lingle* where, as here, the plaintiff-employee never invoked the grievance/arbitration procedure (Opp. at 9 n. 9), is incorrect. In that case the Court merely "vacated and . . . remanded . . . for further consideration in light of *Lingle*" without rendering any decision on the merits. *See Martin v. Carling National Breweries, Inc.*, 486 U.S. 1049 (1988).

If, as petitioner contends, the case below and others in accord therewith[5] have all misread *Lingle* and have missed the point of the contract-interpretation test *Lingle* reaffirms, the error is no small one. Contrary to Respondent's urgings, the problem is not simply limited to one particular type of state-law claim involving workers' compensation, nor is it limited just to one line of cases gone awry. The error, rather, is symptomatic of the far-ranging, fundamental and well-documented confusion and disarray, in both the state and lower federal courts, as to what *Lingle* really means and what the proper test of §301 preemption really is. *See* Petition at 13-14. Is it, as held below, the nature of the claim *per se* and its legal "elements" that determine "independence" for §301 purposes, which means that entire classes of claims (workers' compensation retaliation being only one example) will always be exempted from the reach of federal labor preemption irrespective of CBA defenses? If so, what exactly is it in the "elements" that immunizes such claims from preemption, given that "non-negotiability" is not a factor. *See Lingle*, 486 U.S. 407 n. 7. Or, instead, is it the specific allegations in the case (including those raised by defendant's defenses) the fact-finder will need to resolve which control in deciding whether CBA interpretation is sufficiently implicated to trigger §301 preemption, which means that preemption must be decided "on a case-by-case basis"? *See Lueck*, 471 U.S. at 220. The decisions are split and confused on these most basic questions. Five years after *Lingle* the confusion and disarray are increasing, not decreasing. *See* Petition at 13-14.

[5] With one exception, the post-*Lingle* cases are in lock-step in finding that workers' compensation retaliation claims are not preempted by §301. *See* Petition at 15 n. 15. Contrary to respondent's contention (Opp. at 10), *Nash v. AT&T Nassau Metals, Inc.*, 381 S.E.2d 206 (S.C. 1989), the one exception finding preemption, clearly did involve a claim by an employee who alleged he was wrongfully terminated because he had filed a "*workers' compensation claim*" and had rejected the employer's proposed settlement of the claim which required him to resign. *See id.* at 207 (emphasis added).

If the Court is of a mind to foray again into the field of §301 preemption — and to address head-on the now better-defined but more divergently answered questions in this important area of law — this is the case by which to do it. Granting certiorari and finding preemption in another workers' compensation retaliation case would be the most effective way to correct any widespread misreading of *Lingle* and to drive home the point — increasingly missed by the state and lower federal courts — that it is the jury's attempt to interpret and analyze CBA provisions (whether injected into the case by plaintiff or defendant) in resolving the state-law claim, not the nature or "elements" of the claim considered in the abstract, which undercuts the central role played by labor arbitrators and otherwise implicates the vital federal labor policies underlying the doctrine of §301 preemption.

Respectfully submitted,

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